(30,134)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 294

ALASKA STEAMSHIP COMPANY

vs.

BERNARD McHUGH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1924

[fol. 1] IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 4051

ALASKA STEAMSHIP COMPANY, a Corporation, Plaintiff in Error,

vs.

BERNARD McHUGH, Defendant in Error

Writ of Error to the United States District Court for the District of Alaska, Division No. 1

STATEMENT OF FACTS

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239 of the Judicial Code

Before Gilbert, Hunt, and Rudkin, Circuit Judges

This action came to the Circuit Court of Appeals for the Ninth Circuit upon writ of error to the United States District Court for the District of Alaska, Division One, upon a judgment in favor of Bernard McHugh, plaintiff in the District Court, and against the Alaska Steamship Company, a corporation, defendant in the District Court. The action was to recover damages for personal injuries. The complaint charged that in 1922 at Ketchikan, Alaska, plaintiff was a stevedore employed by the defendant to assist in unloading coal from defendant's steamship Latouche, and that while engaged in shoveling [fol. 2] coal into an iron bucket furnished by defendant, he was injured; that the bucket was a dangerous and unsafe appliance; that the defendant knew that the appliance was unsafe and dangerous in that the handle was defective, and negligently failed and refused to replace or repair it; that planitiff was inexperienced and was unable to discover the defects in the appliance. The defendant by answer generally denied all allegations of the complaint but admitted that it was engaged as a common carrier of freight in the coastwise carrying trade in the waters of Alaska, and that plaintiff was employed by it as a stevedore in unloading coal from the Latouche. For affirmative defenses the defendant pleaded the combined defenses of negligence, fellow servants, and contributory negligence, and alleged that defendant assumed the risks incident to the business of unloading coal from the vessel. Defendant also affirmatively alleged that the ship at the time in question was lying in the tidal and navigable waters of the North Pacific Ocean in the territory of Alaska, and was then and

there made fast by lines to a certain dock that extended out into said waters. By reply the plaintiff, after denying the allegations of two of the affirmative defenses, admitted that the ship was then and there lying in the tidal waters of the North Pacific Ocean and was made fast to the dock as alleged in the defendant's answer.

There was a trial to jury and the verdict and judgment for plaintiff for $4,750 and interest were entered.

The District Court held that the action was maintainable under the provisions of the Act of June 11, 1906, Chap. 3073, 34 Stat. 232, commonly known as the Employers' Liability Act, and instructed the [fol. 3] jury that in the action the fact that the employe may have been guilty of contributory negligence would not bar a recovery by the employe where his contributory negligence was slight and that of the employer was gross in comparison, but that damages should be diminished by the jury in proportion to the amount of negligence attributable to the employe. The act of June 11, 1906, (34 Stat. 232) provides:

"That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employes, or in the case of his death, to his personal representatives for the benefit of his widow and children, if any, or if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works."

Section 2. "That in all actions hereinafter brought against any common carrier to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guitly of contributory negligence shall not bar a recovery where his contributory neglicence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury."

Questions Certified

The questions of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction of the Supreme Court are:

1. Is the owner of a ship, a common carrier engaged in coastwise commerce trade in the territory of Alaska, liable to one of its employes, a stevedore, for damages which have resulted by reason of a defect or insufficiency due to the owner's negligence in an appli-

ance furnished to the employe as provided under sections 1 and 2 of the Act of June 11, 1906, Ch. 3073, 34 Stat. 232, commonly known as the First Employers' Liability Act?

[fol. 4] 2. If there is such liability and the employe has been guilty of contributory negligence, is the employe barred from recovery where his negligence was slight and that of the employer was gross in comparison, and shall the damages be diminished by the jury in proportion to the amount of negligence attributable to the employe?

Wm. B. Gilbert, William H. Hunt, Frank H. Rudkin, Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239 of the Judicial Code. Filed February 7, 1924. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

A true copy. Attest February 7, 1924.
F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.
(Seal of the United States Circuit Court of Appeals, Ninth Circuit.)

[Endorsed:] No. 4051. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Steamship Company, a Corporation, Plaintiff in Error, vs. Bernard McHugh, Defendant in Error. Certified copy of Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239 of the Judicial Code.

Endorsed on cover: File No. 30,134. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 294. Alaska Steamship Company vs. Bernard McHugh. (Certificate.) Filed February 18, 1924. File No. 30,134.

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P.O. SPRING S.T.A.
MANHATTAN

In the

Supreme Court of the United States

October Term, 1924

No. 294

ALASKA STEAMSHIP COMPANY,
Plaintiff in Error

vs.

BERNARD McHUGH,
Defendant in Error

ON CERTIFICATE FROM THE UNITID STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Alaska Steamship Company

STATEMENT

Bernard McHugh, defendant in error, was employed by the steamship company as a stevedore to assist in unloading coal from the steamship company's vessel, "Latouche," then lying in navig-

able waters within the territorial limits of Alaska. While so engaged, he was injured on board the vessel, and thereafter brought an action at common law in the District Court of Alaska against the steamship company for damages alleged to have resulted from such injuries, alleging that the injuries resulted from his use of a dangerous and unsafe appliance furnished him by the steamship company for such work. The steamship company appeared and by answer denied generally all allegations of the complaint, and for affirmative defenses pleaded negligence of fellow servants of the plaintiff, contributory negligence of the plaintiff, and assumption of risk by the plaintiff. The case was tried by a court and jury in Alaska, and on the trial the trial judge instructed the jury that the action was maintainable by the plaintiff under the provisions of the Act of June 11, 1906 (First Employers' Liability Act); that contributory negligence would not bar recovery but should be considered by the jury in diminution of damages. This instruction took from the jury all considerations of the defense of negligence of a fellow servant, for the reason that the Act of 1906 referred to makes the carrier liable to an injured employee for all damages which may result "from the neg-

ligence of any * * * employees," even though such employees may be fellow servants with the plaintiff. A verdict was returned in favor of the plaintiff, and the case taken to the Circuit Court of Appeals for the Ninth Circuit; and the question of law arising upon this instruction to the jury has been certified to this court. In substance and effect, the first question involves the validity of the Act of June 11, 1906, commonly known as the First Employers' Liability Act, and its application to maritime torts committed on navigable waters within the territorial limits of the Territory of Alaska.

I.

(a) It Was Never the Intent of Congress That This Act Should Apply to Maritime Torts Either in Territorial or Other Navigable Waters.

It is true that the language used in the first section, to-wit, "Every common carrier engaged in trade or commerce," is broad enough to include water carriers, but it seems to us that the Act taken as a whole discloses, with reasonable certainty, that it was not the intent of Congress by this Act to change in any respect the uniform rules

of the maritime law applicable to maritime torts. The language of the concluding part of Section 1 seems to point quite clearly to common carriers on land rather than on water, for the reason that the instrumentalities enumerated and for defects in which the carrier is made responsible are "cars, engines, appliances, machinery, track, roadbed, ways, or works." The word "appliances" could, of course, be applied to the equipment of a vessel used on board in discharging its cargo; but if construed as meaning things similar or of like kind indicated by the other words used in the same connection, it could not be so applied. In the Act of April 22, 1908, known as the Second Employers' Liability Act, the words used in this same connection are "cars, engines, appliances, track, roadbed, works, *boats*, *wharves*, and other equipment." Taken literally, that Act provides that every common carrier by railroad shall be liable to its employees for any injury resulting from the negligence of its officers or employees "by reason of any defect or insufficiency due to its negligence in its * * * boats, wharves, or other equipment."

Notwithstanding this plain language in the Act, this court in *Southern Pacific Co. v. Jensen*, 244 U.

S. 205, refused to sustain the contention that the Act applied to a common carrier by railroad owning and operating an ocean going ship, for an injury to an employee suffered on board the vessel by reason of a defect or insufficiency due to its negligence in the ship or its appliances, saying, "It is unreasonable to suppose that Congress intended to change long established rules applicable to maritime matters merely because the ocean going ship concerned happened to be owned and operated by a company also a common carrier by railroad." We think it is equally unreasonable to suppose that Congress by the use of the general term "common carrier engaged in trade or commerce" in the Act of June 11, 1906, intended to change these long established rules of maritime law applicable to maritime torts merely because of the use of the general term "common carriers." If the Act is applicable to maritime torts, it applies to and controls the rights of injured seamen as well as longshoremen; to foreign vessels as well as domestic vessels. When we consider the rights of injured seamen to maintenance and cure at the expense of the vessel, including the right to require the vessel to seek prompt medical aid—even by a detour from the contemplated voyage, if necessary—; their right

to be returned to their own country after cure, at the ship's expense, if they are destitute; and the general rules of the maritime law relative to their right to indemnity for personal injuries—rules that are substantially uniform and enforced in all maritime countries,—it is surely reasonable to assume that Congress, if it intended to invade that field and materially change these substantive rights and rules of decision, would have signified its intent in clear and unambiguous terms; and that it would also have carefully restricted its legislation to domestic vessels and American seamen. When by the Act of 1920, it altered the rules of liability to seamen, it did observe these limitations. The confusion and trouble that might arise from an application of this Act of 1906 to seamen injured on a foreign vessel in Alaskan waters while trading between Alaska and a foreign country, can easily be imagined.

This view, we think, is strengthened by the fact that this Act clearly contemplates that an action brought thereunder shall be a common law action, tried according to the rules of the common law except as modified by the Act; and it specifically provides that "all questions of negligence and contri-

butory negligence shall be for the jury." If our construction of this statute is correct, it takes jurisdiction of maritime cases arising under the Act from the admiralty courts where such jurisdiction is conferred by the Constitution and vests it exclusively in common law courts.

In *Panama Railroad Co. v. Johnson*, —— U. S. ——, (decided April 7, 1924) where a somewhat similar question was raised under Section 33 of the Act of June 5, 1920, giving an injured seaman the option at his election to maintain an action at law under the statute with a trial by jury, this court said:

"But it is insisted that, even if the statute brings those rules into that law, it is still invalid in that it restricts the enforcement of rights founded on them to actions at law, and thereby encroaches on the admiralty jurisdiction intended by the Constitution. It must be conceded that the construction thus sought to be put on the statute finds support in some of its words, and also that, if it be so construed, a grave question will arise respecting its constitutional validity. But, as this court often has held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score.'"

The Act of June 11, 1906, does not confer upon the injured employee the alternative of suing at law with a trial by jury or in admiralty according to the admiralty practice. On the contrary, the statute specifically provides:

"That in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employee * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

This language is positive, mandatory, and applies by the express terms of the statute to all actions thereafter brought against a common carrier to recover damages upon the right of action given by the Act for injuries to an employee. If the Act is held to be valid and to apply to maritime torts, then the constitutional jurisdiction of admiralty courts is taken away. The statute requires the amount of damages sustained by the plaintiff and the proportion thereof that should be diminished by reason of his contributory negligence to be deter-

mined by a jury, and also that the question of the negligence of the defendant shall be determined by a jury. There is no possibility, so far as we can see, of reconciling these provisions of the statute with the inherent admiralty jurisdiction over maritime causes of action.

Again—Since the decisions of this Court in the *Employers' Liability Cases* (207 U. S. 463), holding the Act unconstitutional as general legislation, and in *El Paso etc. Co. v. Gutierrez*, 215 U. S. 87, and *Washington etc. Co. v. Downey*, 236 U. S. 190, upholding the Act as local legislation for the territories, its application to maritime torts will offend against the uniformity rule which this Court has repeatedly held to be a Constitutional requirement of any Congressional legislation modifying or altering the rules of the maritime law.

At any rate, a construction of the statute as applied to maritime causes of action plainly raises grave questions regarding its constitutional validity, and, under the rule stated in the *Panama Railroad Company Case, supra*, the statute should be construed, if fairly possible, so as to avoid either *the conclusion or grave doubts of its constitutionality.* This can be done by giving effect to the plain

intent of the statute as a whole, and limiting its application to torts on land.

(b) IF THE ACT OF JUNE 11, 1906, WAS APPLICABLE TO MARITIME TORTS, AT THE TIME OF ITS ENACTMENT, IT WAS REPEALED BY IMPLICATION OR SUPERSEDED BY THE ACT OF APRIL 22, 1908, THE SECOND EMPLOYERS' LIABILITY ACT.

After the decision of this Court in *Employers' Liability Cases*, 207 U. S. 463, holding the Act to be unconstitutional, the President addressed Congress in regard thereto as follows:

"As respects the Employers' Liability Law, I advocate its immediate re-enactment limiting its scope so that it will apply only to the class of cases as to which the court says it can constitutionally apply but strengthening its provision within its scope."

Cong. Rec. 60th Cong., 1st Section, 1347.

Pursuant to that recommendation, the Act of April 22, 1908, was passed. Section 8 of that Act is as follows:

"That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress, or to affect the prosecution of any pending proceedings or right of action under the Act of Congress * * *" of June 11, 1906.

This Act of 1908 is a revision of the prior Act of June, 1906. When the prior Act was declared unconstitutional by this Court, the President, by his message above quoted, recommended that Congress "re-enact" the law, limiting its scope to conform to this Court's decision; and Congress, acting upon this recommendation, promptly passed the Act of 1908. This was, in effect, a revision of the former Act, a re-enactment of such parts thereof as Congress intended thereafter to be in force. Such a revision, although not bringing into the new Act all of the features of the old Act, operates a repeal of the old Act without any express words of repeal. A very clear statement of this rule of construction is given in *Roche v. Jersey City*, 40 N. J. L. 257, 262, as follows:

"This rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded."

See also, *Sutherland on Statutory Const.*, Sec. 154, et seq.

In the Act of 1908, Congress, in view of the decision of this court declaring the previous act unconstitutional, and following the recommendation of the President, re-enacted such parts of the old Act as it wished to remain operative, and, by Section 2, expressly included the territories within its scope. That it intended this Act to express the whole of its will upon the general subject—the rules to govern the liability of common carriers to employees for personal injuries—in view of the limitations and restrictions the decision of this court had imposed upon it, seems entirely clear, when we consider the entire history of this legislation and the terms of the Act itself. With this in mind, the reason for inserting the clause in Section 8 protecting pending proceedings and existing rights of action under the Act of 1906, is clear. It was equivalent to saying:

"The repeal of the Act of 1906 by this Act shall not prevent or affect the prosecution of pending proceedings or rights of action accrued thereunder."

Unquestionably the second Act superseded the first with respect to rights of employees against

common carriers by railroad, because it cannot be assumed that Congress intended that common carriers by railroad within the Territories or District of Columbia should be subject to the varying and in some respects inconsistent provisions of both Acts. For instance, Section 4 of the first Act provides that no action shall be maintained thereunder unless commenced within one year from the time the cause of action accrued, while Section 6 of the second Act provides the limitation of two years. Again, Section 2 of the first Act provides that contributory negligence of the plaintiff shall not bar a recovery "where his contributory negligence was slight and that of the employer was gross in comparison," whereas Section 3 of the second Act provides that contributory negligence of the plaintiff shall not bar a recovery in any case but the damages should be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided, however, that contributory negligence of the plaintiff shall not be considered in any respects if the employer contributed to the injury by the violation of any of the statutes enacted for the safety of employees.

If the second Act supersedes and, therefore, repeals the first Act as to all common carriers by

railroad, can it be assumed by the Court that Congress intended to continue in effect those portions of the original Act applying to common carriers in the Territories other than railroads? It seems to us that the main purpose, at least, in the passage of the original Act was to provide rights of action for injuries to employees of common carriers by railroad and if that portion of the Act is repealed by the enactment of the subsequent Act of April, 1908, the original Act is emasculated to such an extent that it cannot be consistently held to any longer represent the deliberate will of Congress with respect to other carriers in the Territories.

II.

Act of June, 1906, Unconstitutional, If Intended to Apply to Maritime Torts.

We insist, however, that whether the Act of June 11, 1906, was intended to apply to maritime torts or not, it is clearly unconstitutional if so applied, and this for two reasons:

First, it destroys the uniformity which this court has time and time again held was intended and secured by Section 2, Article 3 of the Constitution

adopting the existing maritime law. This court has repeatedly held that while state statutes may in some minor respects affect maritime rights,—as, for instance, the state statutes conferring a right of action for death,—and that Congress has power to make certain modifications, amendments, or alterations in the maritime law, the exact scope and limitations of this power not being definitely fixed, yet neither the state nor Congress can defeat the feature of uniformity in the maritime law in all matters affecting interstate trade and commerce and commerce with foreign nations. The recent pronouncement by this court on that subject (*Panama Railroad Company v. Johnson, supra*), used the following language:

"As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in colonial times and during the Confederation, and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system

and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States—subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject, and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them, or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision

require that the enactment—when not relating to matters whose existence or influence is confined to a more restricted field, as in Cooley v. Port Wardens, 12 How. 299, 319, 13 L. Ed. 996, 1004—shall be coextensive with and operate uniformly in the whole of the United States."

To uphold the Act of June, 1906, as applicable to martime torts would give rise to one rule of maritime law applicable to the waters of Alaska and possibly those adjacent to the District of Columbia, and a different rule for all other waters of the United States and on the high seas. It would destroy the fundamental conception upon which this court based its decision in the *Jensen Case*, in the *Panama Railroad Company Case*, and in the Case of *Washington v. Dawson*, 264 U. S. ____, 44 Sup. Ct. Rep. 302, as well as the reasoning of the Court in numerous other cases, including *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.

Second, we think the Act as applied to maritime torts is unconstitutional for the further reason heretofore indicated, that is, the requirement that in all actions to enforce the rights created by the statute, all questions of negligence and contributory negligence shall be for the jury. This is wholly irreconcilable with Section 2 of Article 3 of the

Constitution, and defeats the constitutional provision conferring jurisdiction over maritime cases on the admiralty courts. It is an attempt to change the boundaries of admiralty jurisdiction by excluding therefrom all maritime causes of action for personal injuries to an employee, whether a seaman, a longshoreman, or other employees, and to confer exclusive jurisdiction thereof upon courts of common law, giving exclusive power to the jury to determine the questions of fact. In the *Panama Railroad Company Case, supra*, this Court was able to construe Section 33 of the Merchant Shipping Act of 1920, as altering and amending the maritime law applicable to seamen in certain respects, and as giving the seamen the option to enforce the rights given by the Act either in a common law action or in admiralty; but while the Act of 1906 gives certain rights to employees not previously held by them, it provides that such rights shall be enforced in a court having a jury—plainly a common law court—and that the jury shall be the exclusive trier of the facts. There is no option to seek enforcement of these statutory rights in admiralty or at common law, at the election of the employee. A jury trial, with a submission to the jury of "all questions of negligence and contributory negli-

gence," is required by Section 2 of the Act "in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employee." If valid, the Act alters the rule of maritime law, as announced in the *Osceola Case* (189 U. S. 158) that a seaman cannot recover indemnity for injuries resulting from the acts or negligence of other members of the crew, and gives him a right of recovery in such case; but this right of action so given by the Act can be enforced only in a court sitting with a jury, to whom all questions must be submitted.

That a tort committed on a stevedore on board a vessel in navigable waters is maritime in its nature and within the admiralty jurisdiction, is well settled.

> *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52.

That Congress may change the rules of law applicable to such a tort may be conceded; but such changes must be "country-wide and uniform in operation"; and, while Congress may confer concurrent jurisdiction in such cases upon common law courts, it cannot encroach upon the inherent jurisdiction of admiralty over such cases by giving

the common law courts exclusive jurisdiction. These limitations upon the power of Congress with respect to the subject—both in its substantive and its procedural features—"have come to be well recognized."

Panama Railroad Co. v. Johnson, supra.

Respectfully submitted,

W. H. BOGLE,
LAWRENCE BOGLE,
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Attorneys for Alaska Steamship Company.

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In the

Supreme Court of the United States

October Term, 1924

No. 294

ALASKA STEAMSHIP COMPANY,
Plaintiff in Error.

—*vs.*—

BERNARD MCHUGH,
Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF BERNARD MCHUGH, Defendant in Error

STATEMENT

Counsel for defendant in error assumes the facts stated in the Certificate of the Judges of the Circuit Court of Appeals for the Ninth Circuit will be taken as the facts in this case, in the Supreme Court.

QUESTIONS CERTIFIED

The first question upon which the Circuit Court of Appeals for the Ninth Circuit desires the instruction of the Supreme Court is:

"1. Is the owner of a ship, a common carrier engaged in coastwise commerce trade in the Territory of Alaska, liable to one of its employes, a stevedore, for damages which have resulted by reason of a defect or insufficiency due to the owner's negligence in an appliance furnished to the employe as provided under sections 1 and 2 of the Act of June 11, 1906, Ch. 3073, 34. Stat. 232, commonly known as the First Employers' Liability Act?"

(1) The Act of June 11, 1906, is constitutional and valid in the Teritories.

El Paso v. Guiterrez, 215 *U. S.* 87.
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Alaska is an organized Territory:

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Alaska v. Troy, 258 *U. S.* 101.
The Coquitlam v. United States, 163 *U. S.* 346.

Binns v. United States, 194 *U. S.* 486.
Rasmussen v. United States, 197 *U. S.* 516.

(2) The First Employers' Liability Act of June 11, 1906, was not repealed by the Second Act of June 22, 1908.

Sec. 8, *Act June* 22, 1908, 35 *Stat.* 65.
El Paso v. Guiterrez, supra.
Walsh v. Pacific Steamship Co. 172 *Pac.* (*Wash.*) 269.
Sanstrom v. Pacific Steamship Co., 260 *Fed.* 661.

The Walsh case, supra, was decided by the Supreme Court of the State of Washington, after elaborate preparation and careful argument by able counsel, the attorneys for plaintiff in error in this case being the attorneys for the respondent in that case. It covers almost every point raised on the certificate and in plaintiff in error's brief, and we specially rely upon it without further quotation therefrom.

(3) The provisions of the Act of 1906 apply to and govern a suit for personal injury received on a vessel engaged in trade and commerce in the navigable waters of Alaska Territory.

Walsh v. Pacific Steamship Co., supra.

Sanstrom v. Pacific Steamship Co., supra.
Lancer v. Anchor Line, 155 *Fed.* 433.

"From the first section it is certain that the Act extends to every individual who may engage in interstate commerce as a common carrier. Its all-embracing words leave no doubt for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, or ferries, bridges, wagon lines, carriages, trolley lines, etc.

Howard v. Illinois C. R. Co., 207 *U. S.* 463, (497).

(4) The Act of 1906 is not void for conflict with any Constitutional rule of uniformity.

Counsel for plaintiff in error, in their brief, lay great stress upon their argument that the Constitution places some definite limitation upon the power of Congress to legislate in respect to admiralty and commerce, which they call the "rule of uniformity."

They pronounce the Act of 1906 to be void and unconstitutional because (quoting from page 9 of their Brief), "its application to maritime torts will offend against the uniformity rule which this court has repeatedly held to be a constitutinal

requirement of any Congressional legislation modifying or altering the rules of the maritime law."

And on page 14 of their Brief: "First, it destroys the uniformity which this court has time and again held was intended and secured by Section 2, Article 3, of the Constitution adopting the existing maritime law."

From these premises counsel reach the conclusion (page 17 of their Brief) that:

"To uphold the Act of June, 1906, as applicable to maritime torts would give rise to one rule of maritime law applicable to the waters of Alaska, and possibly those adjacent to the District of Columbia, and a different rule for all other waters of the United States and the high seas."

This court has, indeed, often declared that a rule of uniformity is necessary in this class of legislation, but has not applied its rulings in the direction so forcefully pointed out by counsel. In Panama Railroad Co. v. Johnson, decided April 7, 1924, it is said:

"But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing

falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments—when not relating to matters whose existence or influence is confined to a more restricted field as in Cooley v. Port Warden, 12 How. 299, 319. 13 L. Ed. 996, 1004—shall be coextensive with and operate uniformly in the whole of the United States (citing a list of authorities)."

If the last clause in the above quotation stood alone, without the explanation afforded by the accompanying citations, it would seem to justify the interesting argument based on it by counsel for plaintiff in error. But similar rulings have frequently been made by this court, with due explanation, which show exactly what the court had in mind in its use in the Panama case, as well as in all others like it.

"One thing, however, is unquestionable: The Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with Foreign States."

The Lottawanna, 21 *Wall.* 558, 22 *L. Ed.*, 654, (662).

In Knickerbocker Ice Co. v. Stewart, 253 U. S. 140, 64 L. Ed., 834, the rule of uniformity in admiralty and maritime law and cases was considered, and Southern P. Co. v. Jensen, 244 U. S. 205, and Chelentis v. Luckenbach Steamship Co., 247, U. S. 372, 62 L. Ed. 1171, examined and quoted, and in these three cases the foundation of the rule stated to be based upon the exclusive jurisdiction of Congress and the Federal courts over admiralty and maritime law and cases, and not upon any supposed rule of exact uniformity in Congressional enactment.

Waring et. al. v. Clarke, 4 *How.* 441 (457).

Workman v. New York, 179 *U. S.* 552, 45 *L. Ed.* 314.

Western Fuel Co. v. Garcia, 257 *U. S.* 233, 66 *L. Ed.* 210.

Grant Smith-Porter Co. v. Rhode, 257 *U. S.* 469, 66 *L. Ed.* 321.

State Industrial Com. v. Nordenholdt Corp., 259 *U. S.* 263, 66 *L. Ed.* 933.

The object of vesting in the general government the power to regulate commerce with foreign nations and among the several States was to insure

uniformity of regulation and to prevent discriminating State legislation.

Walton v. Missouri, 91 *U. S.* 275, 23 *L. Ed.* 347.

Webber v. Virginia, 103 *U. S.* 344, 26 *L. Ed.* 565.

Mobile Co. v. Kimball, 102 *U. S.* 691, 26 *L. Ed.* 238.

It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power if no other to introduce such changes as are likely to be needed.

The Lottawanna, 21 *Wall.* 558, 22 *L. Ed.*, 654.

Butler v. The B. & S. Steamship Co., 130 *U. S.* 527.

Panama Ry. Co. v. Johnson, supra.

And, finally, in the case of Alaska v. Troy, 258 U. S. 101, this court said:

"Obviously, the best interests of a detached territory may often demand that its ports be treated very differently from those within the States. And we can find nothing in the Constitution itself or its history which compels the conclu-

sion that it was intended to deprive Congress of power so to act. See Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421, 15 L. Ed. 435; Knowlton v. Moore, 178 U. S. 107, 44 L. Ed. 995, 20 Sup. Ct. Rep. 747."

Alaska v. Troy, 258 *U. S.* 101, 66 *L. Ed.* 487.

The second question certified for instruction is:

"2. If there is such liability and the employe has been guilty of contributory negligence, is the employe barred from recovery where his negligence was slight and that of the employer was gross in comparison, and shall the damages be diminished by the jury in proportion to the amount of negligence attributable to the employe?"

No special argument seems to be made in the brief for the plaintiff in error on this inquiry, and defendant in error assumes that it is admitted by the plaintiff in error that Congress has power to declare that rule of law.

The statute at bar clearly falls within the Constitutional provision that "Congress shall have power to regulate commerce," which power is without limitation.

"It is true the commercial power conferred by

the Constitution is one without limitation. It authorizes legislation with respect to all subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated, how they shall be registered or enrolled and licensed; to what tonnage, hospital and other dues they shall be subjected; what rules they shall obey in passing each other; and what provisions their owners shall make for the health, safety and comfort of their crews."

Sherlock v. Alling, 93 *U. S.* 90; 23 *L. Ed.* 819.

The principle of balancing and dividing the damages in cases of injury in accordance with the varying degrees of comparative negligence of the employer and employe is not a new one, but is one of long standing and was well recognized in admiralty long prior to the passage of the Act of June 11, 1906.

The Max Morris, 137 *U. S.* 1; 34 *L. Ed.* 586.

Congress has power to change or abrogate the common law rules of contributory negligence, as-

sumption of risk, and similar rules, in interstate commerce.

Johnson v. Southern P. Co., 196 *U. S.* 1; 49 *L. Ed.* 363.

Schlemmer v. Buffalo R. Co., 205 *U. S.* 1; 51 *L. Ed.* 681.

The Max Morris, 137 *U. S.* 1; 34 *L. Ed.* 586.

St. Louis Ry. Co. v. Taylor, 210 *U. S.* 281; 52 *L. Ed.* 1061.

Mondou v. New York, etc. Ry., 223 *U. S.* 1; 56 *L. Ed.* 327.

Respectfully submitted on brief,

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